

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B066

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GEORGE PAYTON,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
SAN CARLOS CORRECTIONAL FACILITY,

Respondent.

The hearing in this matter was held on April 23, 1997, in Denver before Margot W. Jones, Administrative Law Judge (ALJ). Respondent appeared at hearing through Ceri Williams, Assistant Attorney General. Complainant, George Payton, was present at the hearing and represented by James R. Gilsdorf, Attorney at Law.

Respondent called the following witnesses to testify at hearing: Kimberly Chavez; Greg Chavez; John Roberts; Reuben Avila; and Wallis Parmenter. Complainant testified in his own behalf and called no other witnesses.

The parties stipulated to the admission of respondent's exhibits 1 through 3, 5, and 7 through 9. Respondent's exhibits 4 and 6 were admitted into evidence without objection. Complainant did not offer exhibits into evidence at hearing.

MATTER APPEALED

Complainant appeals a permanent disciplinary demotion.

ISSUES

1. Whether Wallis Parmenter was delegated appointing authority to impose disciplinary action on complainant.
2. Whether Wallis Parmenter was predisposed to impose discipline.
3. Whether the imposition of disciplinary action was arbitrary, capricious, or contrary to rule and law.
4. Whether complainant is entitled to an award of attorney fees

and cost under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

PRELIMINARY MATTERS

1. Complainant's request to sequester the witnesses from the hearing room was granted.

2. At respondent's request, administrative notice is taken of the Initial Decision of the Administrative Law Judge Robert W. Thompson in the case entitled, George Payton v. Department of Correction, case number 96B153. On the ALJ's own motion, notice is taken of the State Personnel Board file in this case.

FINDINGS OF FACT

1. Complainant George Payton (Payton) is an employee of the Department of Corrections (Department). On August 17, 1996, Payton was employed at the San Carlos Correctional Facility. Wallis Parmenter (Parmenter) was the Superintendent of this correctional facility during the relevant period from March, 1996, to November 14, 1996. San Carlos Correctional Facility is in the eastern region of the Department.

2. This appeal concerns a disciplinary demotion imposed on November 14, 1996, by Wallis Parmenter. However, in March, 1996, Parmenter also imposed a disciplinary demotion on Payton for his alleged inappropriate contact with an inmate. Payton appealed the discipline. An administrative hearing was held in that appeal on August 15 and 16, 1996. Parmenter was present at the August 15 and 16 hearing as the advisory witness. Payton testified at that hearing.

3. At the August 15 and 16, 1996, hearing, Parmenter testified that Payton had been forthright and truthful during the investigation of the incident of inappropriate contact with an inmate. However, after hearing Payton's testimony at the administrative hearing, Parmenter formed the opinion that Payton was not a truthful individual. Parmenter believed that Payton lied during his testimony.

4. An Initial Decision of the Administrative Law Judge was entered in that case on September 13, 1996, finding that Payton engaged in the conduct which gave rise to the discipline but, in light of all the circumstances, the discipline imposed was too severe.

5. On August 17, 1996, the day following the administrative hearing concerning the allegation of inappropriate contact with an inmate, it was alleged that Payton engaged in conduct which might warrant disciplinary action.

6. An investigation of Payton's August 17, 1996, conduct was conducted by an investigator from the Department of Corrections, Inspector General's Office. The investigator's report dated October 18, 1996, was provided to Parmenter. Parmenter concluded that there may be a basis for disciplinary action to be taken against Payton as a result of the alleged misconduct on August 17, 1996.

7. Parmenter thought that because she imposed disciplinary action on Payton in March, 1996, there would be the appearance of bias if she again was delegated authority to consider disciplinary action. Parmenter discussed this matter with the Eastern Regional Director Carl Zenon, and other superintendents at the Department of Corrections. Parmenter received advice that the appearance of bias should not be of concern to her.

8. Parmenter asked Zenon to exercise appointing authority to consider disciplinary action against Payton as a result of his alleged misconduct on August 17, 1996, because she believed that any action taken by her might be viewed as retaliatory. Zenon refused this request and directed Parmenter to conduct the disciplinary process under Board Rule, R8-3-3.

9. In October, 1996, the statutorily appointed authority for the purpose of the imposition of disciplinary action on Payton was Jerry Gasko, the Deputy Director of the Division of Correctional Services. Gasko's predecessor in this position was John Perko. Carl Zenon's authority to act in personnel matters in the eastern region derived from the delegation of that authority from John Perko.

10. Carl Zenon's authority to manage and direct the eastern region is outlined in a February 13, 1995, letter.(Exhibit 1.) The February 13 letter states, in pertinent part:

February 13, 1995

Carlton "Carl" Zenon
East Region Director
2862 Circle Drive, Suite 400
Colorado Springs, CO 80906

Re: Appointing Authority

Dear Mr. Zenon:

This letter affirms your appointment to the Department of Corrections position with the working title of Director, East Region, unless otherwise expressly set forth, in writing, by the Executive Director, Aristedes Zavaras, or me. Effective April 15, 1995, unless expressly rescinded in writing, you are to exercise all authorities and powers necessary for the effective, efficient administration of the East Region as identified by the attached organizational chart.

Accordingly, you are hereby delegated authorities, duties, powers, and responsibilities of "Appointing Authority" for positions assigned under your Region. "Appointing Authority" is defined in the Colorado State Personnel Rules, with specific reference to Rules, Chapter 1 Articles 4 (Attached). You may further delegate this "Appointing Authority" as you determine necessary for the effective functioning of your Region after having obtained my approval. All request for further delegation must be approved by me. Your approval for the delegation must be in writing to the delegate and I am to be copied.

. . .

Sincerely,

/s/

**John Perko
Deputy Director
Division of Correctional Services**

[emphasis added]

11. On October 25, 1996, Parmenter requested, in writing, that Carl Zenon delegate appointing authority to her to conduct a R8-3-3 meeting with Payton to consider the alleged misconduct occurring on August 17, 1996. (Exhibit 2.)

12. As instructed in the emphasized paragraph above, Zenon did not request permission of the Director of Correctional Services to further delegate appointing authority to Parmenter. Instead, on October 25, 1996, Zenon wrote back to Parmenter delegating appointing authority to her for the purpose requested. (Exhibit

3.) Zenon's October 25 letter was copied to Aristedes Zavaras, Executive Director of the Department of Corrections, Jerry Gasko, Deputy Director of the Division of Correctional Services, and "Personnel".

13. Parmenter conducted a R8-3-3 meeting with Payton on November 6, 1996. Following that meeting, Parmenter considered the information she received concerning Payton's alleged conduct on August 17, 1996. Parmenter was required to exercise her judgment to determine the credibility of citizens lodging a complaint against Payton versus Payton's version of the August 17 events. She concluded that Payton's statement of the events occurring on August 17, 1996, were not credible. She decided to impose a permanent disciplinary demotion. Payton was advised of the demotion by letter dated November 14, 1996. Payton appeals that action here.

DISCUSSION

Respondent contends that it sustained its burden of proof to establish that Parmenter was the duly delegated appointing authority for complainant's position and complainant was afforded due process during the predisciplinary procedures.

Complainant contends that Parmenter lacked the authority to impose disciplinary action because she was not properly delegated that authority. Complainant further contends that, even if Parmenter had appointing authority, he was denied due process because she was predisposed to impose discipline.

The merits of this action cannot be reached because it is concluded that Parmenter lacked appointing authority to impose discipline. The merits of the allegation of misconduct are also not reached because it is concluded that Parmenter was predisposed to impose disciplinary action on complainant and thus complainant was denied due process of law.

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that authority exists for the action taken. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously, or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

State Personnel Board Rule, R1-4-2, governs the delegation of appointing authority. It states:

R1-4-2 Delegation. The appointing authority may delegate authority for all personnel functions and actions. [Citation omitted.]

(A) Unless otherwise specified in these rules, such delegation need not be in writing so long as the appointing authority ratifies the action taken. The appointing authority is presumed to have ratified the action taken unless he takes specific action to countermand it within a reasonable period of time. [Citation omitted.]

(B) The delegatee may further delegate authority for personnel functions and actions only if, and to the extent, authorized to do so in writing by the appointing authority. If so authorized, then further delegation shall be governed by subparagraph (A) above. [Emphasis added.] [Citation omitted.]

Rule R1-4-2, in the emphasized portion quoted above, provides for the procedure to be followed if the one to whom appointing authority is delegated wishes to delegate that authority further. The rule states that the authority may be delegated further "only if, and to the extent, authorized to do so in writing by the appointing authority." Ratification of the action taken can only occur after further delegation occurs consistent with subsection (B) above.

In this case, the authorization to further delegate appointing authority is contained in John Perko's April 13, 1995, letter. In other words, the instructions to Carl Zenon on how to further delegate appointing authority to Wallis Parmenter to discipline complainant is contained in Perko's April 13, 1995, letter.

In this letter, Perko directs Zenon that he must first obtain the approval of the Director of Correctional Services in order to further delegate appointing authority. The letter states, "You [Carl Zenon] may further delegate this "Appointing Authority" as you determine necessary for the effective functioning of your Region after having obtained my [John Perko's or his successor, Jerry Gasko's] approval. All requests for further delegation must be approved by me [John Perko or his successor, Jerry Gasko]."

The evidence presented at hearing in this matter did not establish that Carl Zenon obtained Jerry Gasko's approval to delegate

appointing authority to Wallis Parmenter. No evidence was presented that Carl Zenon took any action, written, oral, or presumed, to obtain Jerry Gasko's approval to further delegate appointing authority to Wallis Parmenter.

Rule, R1-4-2(B) gives instructions on how appointing authority can be further delegated and states that once the procedures for further delegation is accomplished, only then is reference made to section (A) of the rule addressing ratification.

Carl Zenon letter of October 25, 1996, granting Wallis Parmenter's request for appointing authority is copied to Jerry Gasko. However, the act of copying Gasko on the letter to Parmenter granting her request for appointing authority is consistent with Perko's instructions in the April 13, 1995, letter in which he directs that once Zenon obtains approval for further delegation of appointing authority, the notice to the delegate should be in writing and copied to him. Copying Gasko on the October 25, 1996, letter to Parmenter cannot be viewed as evidence that Gasko was made aware of the delegation and ratified it because there is no provision for ratification at this stage. Copying Gasko is simply compliance with the next step in the delegation process outlined in Perko's April 13, 1995, letter.

Respondent contends that the issues with regard to delegation of appointing authority were previously raised by complainant in his earlier appeal. Respondent contends that these issues were resolved favorably for respondent in the earlier case both before the ALJ and the State Personnel Board on appeal of the initial decision. However, the facts with regard to the appointing authority issue differ in the earlier case.

In the state system, the exercise of appointing authority is limited to a select few as provided by statute, rule or agency directive. The Board rule provides for how appointing authority may be delegated. The only caveat from the Board with regard to further delegation of authority is that further delegation of authority must be consistent with the instructions of the appointing authority.

In this case, there was no evidence that the instructions of the appointing authority pertaining to how to further delegate that authority were complied with, thus Parmenter was without authority to act in this matter. An action taken without authority must be found to be unsustainable.

The other argument made by complainant on which he must prevail is that he was denied due process because Wallis Parmenter was predisposed to impose discipline. The testimony is clear and uncontradicted. Wallis Parmenter testified that, 1. following imposition of the earlier imposed discipline, the appeal of that disciplinary action, and the administrative hearing in that matter

where Parmenter heard complainant testify, Parmenter concluded that complainant is not a truthful person; 2. she requested that Carl Zenon impose discipline in this case because she feared that any discipline imposed by her would be viewed as retaliatory, since the earlier imposed discipline was overturned; and 3. she told Zenon she believed acting as appointing authority in this matter would convey the "appearance of bias".

Parmenter's concerns about retaliation and the appearance of bias make Parmenter appear as a prudent administrator. However, it is her testimony that she believed complainant lied at the earlier hearing and from that she concluded that he is not a truthful person that causes concern in this case. As appointing authority, if one concludes that Parmenter had that authority, her judgment with regard to complainant and the complaining citizens' credibility was paramount. If she commenced the R8-3-3 process without an open mind on the topic of whether complainant was telling the truth about the August 17, 1996, incident then complainant was denied the opportunity to participate in a fair and open exchange of information with the appointing authority as contemplated by R8-3-3.

Predisciplinary due process was considered in another case before the Board. State Personnel Board Case No. 94B090(C), *Oboka v. Department of Human Services*, decided January 24, 1996. In *Oboka*, the ALJ found that the appointing authority prejudged Oboka's case. On appeal, the Board agreed with this determination. In the discussion of this issue in the initial decision Judge Thompson stated,

The appointing authority's prejudgment of this case is of no small consequence. Predisciplinary meetings are an extremely important cog in the wheel of due process to which state employees are constitutionally entitled. The underlying philosophy of the information exchange meeting mandates that the appointing authority listen to, and fairly consider, the employee's position and circumstances, not as a formality or courtesy, but as a last effort to gather the information and formulate the perspective needed to render a fair and appropriate decision. This cannot be accomplished when the appointing authority decides what he is going to do in advance of the meeting and has, in fact, initiated the steps to effectuate his predisposition. To predetermine a decision, as was done here, is to violate both the spirit and the substance of Rule, R8-3-3(D)(1)(a), 4 Code Colo. Reg. 801-1.

The outcome of a fair and open meeting is speculative at this point. Perhaps such a meeting would have been successful in avoiding the litigation that ensued. Having been denied an honest predisciplinary meeting, the

complainant suffered a due process violation for which there must be a remedy. *Cf. Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984).

Here, complainant is entitled to have his August 17, 1996, conduct considered by an appointing authority who is open minded and one who has not predetermined that complainant is not truthful. This is particularly true in a case such as this where credibility is pivotal.

The action from which this appeal arose was groundless since it was taken by a manager who did not possess appointing authority and by an individual who was predisposed to impose discipline on complainant. Under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B), complainant is entitled to an award of attorney fees and cost.

CONCLUSIONS OF LAW

1. The evidence presented at hearing failed to establish that Wallis Parmenter had appointing authority.
2. Complainant was denied due process during the predisciplinary process because Wallis Parmenter was predisposed to impose discipline.
3. Imposition of the disciplinary demotion on complainant was arbitrary, capricious, and contrary to rule and law.
4. The action from which the appeal arose was groundless and thus complainant is entitled to an award of attorney fees and cost.

ORDER

1. Respondent is directed to rescind the disciplinary demotion.
2. Complainant shall be awarded all back pay and benefits deprived him from the date of the imposition of the discipline to the date of its rescission.
3. Complainant is entitled to an award of attorney fees and costs under section 24-50-125.5.

DATED this _____ day of
June, 1997, at
Denver, Colorado.

Margot W. Jones
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties.

Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date

the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of June, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** In the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf
Attorney at Law
1390 Logan street
Denver, CO 80203

and, through interagency mail, to the following address:

Ceri Williams
Office of the Attorney General
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203
